

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ROBBIE HARRIS, *et al.*, )  
Plaintiffs, ) Case No.: 2:19-cv-01537-GMN-EJY  
vs. )  
AMALGAMATED TRANSIT UNION )  
LOCAL 1637, *et al.*, )  
Defendants. )  
)  
**ORDER**

Pending before the Court is the Second Motion to Dismiss, (ECF No. 37), filed by Defendant Amalgamated Transit Union (ATU) Local 1637 (“ATU Local 1637”).<sup>1</sup> Plaintiffs Robbie Harris (“Harris”) and Tonia Khan (collectively, “Plaintiffs”)<sup>2</sup> filed a Response, (ECF No. 41), and ATU Local 1637 filed a Reply, (ECF No. 44).

## I. BACKGROUND

This action arises from allegations of wrongful termination and breach of duty of fair representation. Plaintiffs allege MV Transportation and ATU Local 1637 entered into a valid and binding collective bargaining agreement (“CBA”). (Compl. ¶ 28, ECF No. 1). Plaintiffs are former MV Transportation employees. (*Id.* ¶¶ 29, 57).

On February 14, 2019, MV Transportation terminated Harris based on his attendance, “retroactively penalizing him for approved FMLA leave by converting it into Unexcused Absences.” (*Id.* ¶¶ 20, 40). In terminating Harris, MV Transportation breached the CBA

<sup>1</sup> Defendant MV Transportation Inc. (“MV Transportation”) filed a Joinder to ATU Local 1637’s Second Motion to Dismiss, (ECF No. 40).

<sup>2</sup> On August 18, 2021, the Court severed the claims of Plaintiff Tonia Khan from the instant case. (See Order Granting Motion to Sever, ECF No. 61). Thus, the Court solely addresses Plaintiff Robbie Harris's claims for the remainder of the motion.

1 because it failed to “give [Harris] a verbal warning, written warning, or last chance warning and  
 2 moved immediately to termination.” (*Id.* ¶ 41). MV Transportation further violated the CBA  
 3 “by terminating [Harris] after he complied with the documentation requirements for requesting  
 4 FMLA leave, which had previously been approved by MV Transportation.” (*Id.* ¶ 42).

5 After his termination, Harris requested that ATU Local 1637 President John Foster  
 6 (“Foster”) file a grievance on Harris’s behalf. (*Id.* ¶ 44). On February 28, 2019, Foster  
 7 informed Harris that the grievance was meritless and that he would not file the grievance. (*Id.*  
 8 ¶ 45); (Emails, Ex. 3 to Compl., ECF No. 1). On March 3, 2019, Harris sent ATU International  
 9 President Larry Hanley (“Hanley”) an email informing him of Foster’s refusal to file the  
 10 grievance. (*Id.*); (Compl. ¶ 46). Hanley responded the same day, stating: “Please send a signed  
 11 copy.” (*Id.* ¶ 47); (Emails, Ex. 3 to Compl.). Harris then waited thirty days “before realizing  
 12 that Local 1637 would not honor its duty of fair representation and file the grievance.” (Compl.  
 13 ¶ 48). Plaintiffs allege ATU Local 1637 breached its duty of fair representation to Harris by  
 14 failing to file a grievance on behalf of Harris upon his termination and express request. (*Id.*  
 15 ¶ 49).

16 Plaintiffs commenced this action on September 3, 2019. (*See* Compl., ECF No. 1).  
 17 Plaintiffs’ Complaint alleges the following claims: (1) violation of the Family Medical Leave  
 18 Act (FMLA) – Plaintiff Harris; (2) breach of collective bargaining agreement in violation of  
 19 Section 310 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 – Plaintiff  
 20 Harris; and (3) breach of collective bargaining agreement in violation of Section 310 of the  
 21 LMRA, 29 U.S.C. § 185 – Plaintiff Khan. (*Id.* ¶¶ 15–87). ATU Local 1637 and MV  
 22 Transportation (collectively, “Defendants”) then moved to dismiss Plaintiffs’ Section 301  
 23 claims, arguing that they are time barred. (ATU Local 1637’s Mot. Dismiss, ECF No. 10); (MV  
 24 Transportation’s Mot. Dismiss, ECF No. 19). The Court granted in part and denied in part  
 25 Defendants’ respective Motions to Dismiss, specifically dismissing Harris’s Section 301 claim

1 with leave to amend. (*See Order Granting in Part and Denying in Part Mot. Dismiss* 11:4–8,  
 2 ECF No. 27). Plaintiffs filed an Amended Complaint, (ECF No. 29). ATU Local 1637 then  
 3 filed a Second Motion to Dismiss, (ECF No. 37) and MV Transportation filed a Joinder to its  
 4 Second Motion to Dismiss, (ECF No. 40).

5 **I. LEGAL STANDARD**

6 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
 7 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 8 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on  
 9 which it rests, and although a court must take all factual allegations as true, legal conclusions  
 10 couched as factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule  
 11 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements  
 12 of a cause of action will not do.” *Id.* “To survive a motion to dismiss, a complaint must contain  
 13 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
 14 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A  
 15 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
 16 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
 17 standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

18 “Generally, a district court may not consider any material beyond the pleadings in ruling  
 19 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,  
 20 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the  
 21 complaint may be considered.” *Id.* Similarly, “documents whose contents are alleged in a  
 22 complaint and whose authenticity no party questions, but which are not physically attached to  
 23 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v.  
 24 Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take  
 25 judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282

1 (9th Cir. 1986). Otherwise, if a court considers materials outside of the pleadings, the motion  
2 to dismiss is converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

3 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
4 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
5 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant  
6 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
7 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the  
8 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
9 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
10 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

## 11 **II. DISCUSSION**

12 ATU Local 1637 moves to dismiss the following claims in the First Amended  
13 Complaint: (1) violation of the Family Medical Leave Act (“FMLA”); (2) Section 301 claim as  
14 to Plaintiff Harris; and (3) Section 301 claim as to Plaintiff Khan. (MTD 3:20–8:4). As to  
15 Harris’s first claim under the FMLA, the Court previously dismissed the FMLA claim against  
16 ATU Local 1637. (Order Granting in Part and Denying in Part Mot. Dismiss 6:1–9); (*see also*  
17 Resp. to MTD 3:6–8, ECF No. 41) (acknowledging the Court’s prior order dismissing ATU  
18 from the FMLA claim). Additionally, Plaintiff Khan is no longer a party to this suit. (*See*  
19 *generally* Order Granting Motion to Sever). The Court thus limits its discussion to Harris’s  
20 Section 301 claim below.

### 21 **A. Statute of Limitations**

22 Harris amended his Complaint to add that Defendants breached the duty of fair  
23 representation when Hanley, President of ATU International, failed to intervene and direct  
24 Foster to file a grievance on Harris’s behalf. (FAC ¶¶ 46–50, 52–55). According to Harris, the  
25 ATU Local 1637 bylaws impose a duty on the Local 1637 Executive Board to consider all

1 grievances and complaints, and additionally, permit the President of ATU Local 1637 to  
 2 intervene on any matter so long as a member presents a question to him/her. (*Id.* ¶¶ 46–49).

3 Defendants argue that Harris’s Section 301 claim is still time-barred because Hanley’s  
 4 failure to intervene arises out of the grievance context and thus, the six-month statute of  
 5 limitations applies. (Second MTD 5:4–8:4). In rebuttal, Harris asserts that his Section 301  
 6 claim tolled. (Resp. to Second MTD 3:10–9:22). Since Hanley’s failure to intervene  
 7 purportedly arises in a “non-grievance context,” Harris claims that the statute of limitations for  
 8 his Section 301 claim was tolled on March 3, 2019, when he emailed Hanley requesting  
 9 intervention. (*Id.*).

10 As the Court explained in its previous Order, the applicable statute of limitations for a  
 11 hybrid action is six months. *Del Costello v. Teamsters*, 462 U.S. 151, 171 (1983). The statute  
 12 of limitations “begins to run when an employee knows or should have known of the alleged  
 13 breach of duty of fair representation.” *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir.  
 14 1986). However, when the “duty of fair representation claim is not based on a union’s  
 15 processing of a grievance,” an employee’s good faith attempts to resolve a claim through  
 16 contractual remedies, such as intra-union grievance procedures and arbitration, will toll the six-  
 17 month period. *Id.* at 1509–10.

18 “The vast majority of duty of fair representation claims arise in the grievance procedure  
 19 context: the employee claims that a union failed to process a grievance or mishandled its  
 20 presentation.” *Id.* at 1509. In *Galindo*, the employee alleged that the union made errors in  
 21 presenting his grievance before the arbitrator. *Id.* Because the alleged errors arose out of the  
 22 grievance procedure context, the Ninth Circuit applied the six-month statute of limitations  
 23 period, which began accruing the day the arbitrator issued his order. *Id.*

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1           Similarly, Harris's Section 301 claim arises out of the grievance procedure context.  
 2 Hanley's alleged failure to intervene was initially triggered by ATU Local 1637's decision not  
 3 to file a grievance on Harris's behalf. Specifically, Harris alleges:

4           *That after Local 1637 President Foster refused to file the grievance on his behalf,*  
 5 Plaintiff Harris sent ATU International President Hanley an email questioning the  
 6 Local 1637's President/Business Agent's decision to not file a grievance on his  
 7 behalf on March 3, 2019, informing ATU International of Foster's refusal to file  
 8 the grievance.

9 (FAC ¶ 50) (emphasis added). Harris effectively claims that ATU Local 1637 and its  
 10 representatives continued to breach their duty of fair representation by purportedly failing to  
 11 continually pursue his grievance. The Ninth Circuit, in *Harper v. San Diego Transit Corp.*,  
 12 however, rejected a similar argument that the statute of limitations should be tolled because  
 13 "the Union continually breached its duty of fair representation by continuing to fail to pursue  
 14 his grievance." *Harper*, 764 F.2d 663, 669 (9th Cir. 1985). Harris argues that Hanley and  
 15 Foster's failure to present the grievance to the board for review are matters outside the  
 16 grievance procedure in the CBA; however, fails to provide any persuasive evidence to support  
 17 this assertion. (Resp. to Second MTD 8:4–13). Accordingly, Harris's newly alleged breach  
 18 (i.e., Hanley's refusal to intervene and direct Foster to file a grievance on Plaintiff's behalf),  
 19 arises out of Defendants' initial failure to file a grievance on Harris's behalf. (FAC ¶¶ 50–52).

20           Because the alleged breach of fair representation arose out of the grievance process, the  
 21 six-month statute of limitations applies. *Galindo*, 793 F.2d at 1509 ("[I]n a duty of fair  
 22 representation case, the six-month period generally begins to run when an employee knows or  
 23 should know of the alleged breach of duty of fair representation by a union."). As the Court  
 24 previously held, Harris's Section 301 claim is time-barred since Harris filed his Complaint on  
 25 September 3, 2019, approximately a month after the statute of limitations expired. (Order

1 Granting in Part and Denying in Part Mot. Dismiss 8:11–15). Defendants’ Motion to Dismiss  
 2 as to Harris’s Section 301 claim is thus granted.<sup>3</sup>

3 **B. Leave to Amend**

4 Rule 15(a)(2) of the Federal Rules of Civil Procedure permits courts to “freely give  
 5 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit “ha[s]  
 6 held that in dismissing for failure to state a claim under Rule 12(b)(6), ‘a district court should  
 7 grant leave to amend even if no request to amend the pleading was made, unless it determines  
 8 that the pleading could not possibly be cured by the allegation of other facts.’” *Lopez v. Smith*,  
 9 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.  
 10 1995)).

11 Repeated failure to cure deficiencies in a complaint may justify dismissal with prejudice  
 12 if the court has previously dismissed the complaint, provided plaintiff notice of the complaint's  
 13 deficiencies, and the plaintiff failed to cure the noted deficiencies. *See Smith v. Constellation  
 14 Brands, Inc.*, 725 Fed. Appx. 504, 507 (9th Cir. 2018). The district court's discretion to deny  
 15 leave to amend is “particularly broad” when it has previously given such leave. *See Carnahan  
 16 v. Seterus, Inc.*, 712 Fed. Appx. 702, 703-04 (9th Cir. 2018) (quoting *Gonzales v. Planned  
 17 Parenthood*, 759 F.3d 1112, 1116 (9th Cir. 2014)).

18 Here, the Court denies leave to amend Harris’s Section 301 claim. The Court previously  
 19 provided Harris notice of the deficiencies with the Section 301 claim and Harris failed to cure  
 20 the deficiencies.

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 25 <sup>3</sup> Because the Court finds that Harris’s Section 301 claim is time-barred, the Court does not further address  
 Defendants’ additional arguments.

### **III. CONCLUSION**

**IT IS HEREBY ORDERED** that Defendant ATU Local 1637's Second Motion to Dismiss, (ECF No. 37), is **GRANTED**. Harris's Section 301 is denied with prejudice.

**DATED** this 30 day of September, 2021.

Gloria M. Navarro, District Judge  
**UNITED STATES DISTRICT COURT**